No. 12,089

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES E. EVERETT,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

APPELLEE'S REPLY BRIEF

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STATEMENT OF JURISDICTION

Appellee believes appellant's statement of jurisdiction to be correct.

STATEMENT OF THE CASE

Appellee disagrees with the second paragraph of appellant's statement, and believes this to be the true statement: On the 14th day of July, 1947, at about 10:35 A. M., the complaint alleges that plaintiff in the course of his employment was putting indicator numbers on defendant's locomotive, and further alleges that when descending from the locomotive the handrail pulled out from its bracket and plaintiff allegedly fell and was injured.

ANSWER TO APPELLANT'S SPECIFICATION OF ERRORS

1. The Court committed no error prejudicial to plaintiff in connection with defendant's attempt to offer evidence concerning intoxication.

2. The Court committed no error in refusing to grant plaintiff's motion for new trial on the grounds of insufficient evidence as there was a substantial conflict of evidence which was properly left to the jury's decision.

THE EVIDENCE

Appellee here discusses, for the convenience of this Court, the evidence it believes material to the issues stated above.

Discussions of Evidence Bearing on Specification on Error No. 1.

Defendant offered evidence to prove its contention that plaintiff was not in fact injured, and not unable to work as claimed, but was in fact able to lift, bend, and carry on normal activities. The trial Court permitted such evidence:

(Transcript 50: 7-9)

Q. How many return-to-duty slips have you actually been given?

A. Two.

* * * * *

(Transcript 50: 17-18)

Q. It was your idea, then, to stop work?

A. Yes.

* * * * *

(Transcript 76: 16-23)

"On February 2, 1948 a note was made in the record by Dr. Flinn, which reads as follows: 'Patient up and above ward, etc., without visible evidence of any distress. However, he still complains of tenderness over the coccyx. " 'I believe that patient has some distress, but not to the degree that he complains of. I do not believe removal of the coccyx is indicated, but do believe that he can return to work.' " Signed by Dr. Flinn.

* * * * *

(Dr. Stevens) (Transcript 85: 13-16)

So he was—I put him on the table and examined him and he got onto the table as any able-bodied person would, with no limitation of motion and no effort to protect himself in any way from painful sensations.

* * * * *

(Dr. Holcomb) (Transcript 63: 11-23)

MR. FREEMAN: Q. Doctor, Mr. Everett, as you know, is a railroad fireman. Did you in your examination see any reason why Mr. Everett shouldn't return to work?

A. No, from a clinical standpoint, from the way he looks, he looks strong, looks all right.

He says he can't return to work because in riding in the soft seats of a train it jars him up from the vibration. He can't he says, but from a clinical standpoint we can see no reason why that should be true.

Q. Disregarding what he tells you, can you find anything medically that would justify you in saying he should not return to work?

A. No, sir.

* * * * *

(Dr. Holcomb) (Transcript 67: 6-18

A. Well, I am not his doctor, of course, Mr. Brobst, and I was merely asked to give an opinion as to what I can find, and say so. My findings are that very often law-suits, litigations, keep symptons up long after they are normally gone, and that, I think, must be taken into consideration. I think the average doctor does take that into consideration and does not do things that he cannot justify in his own mind, and I think probably that is why the doctors haven't done it.

Q. What I am trying to find out is what the cause of his pain is and why he can't go back to work, if you can help me.

A. Well, I would suspect that after this action is over he will go back to work. That will be my guess as to the cause of his illness and pain.

* * * * *

Along the same line, and in connection with defendant's stated contention that plaintiff was not ac-

tually injured, but was wilfully refraining from working, defendant also attempted to offer evidence that plaintiff, along with being in normal physical health (see above), was in fact spending much of his time becoming intoxicated rather than working. This evidence was stated to be, and was offered only for this purpose.

(Transcript 50: 19-24)

Q. As a matter of fact, Mr. Everett, you have been doing a good deal of drinking down in Santa Barbara, haven't you?

MR. BROBST: I object to that as immaterial.

MR. FREEMAN: It is not immaterial. If this man is really trying to get well and is really spending his time drinking, that is very material.

* * * * *

(Transcript 51: 2-8)

MR. FREEMAN: I don't want to make an offer of proof in the presence of the jury, but we are perfectly prepared to connect this up. In other words, as I said before, and I said in my opening statement I want to show that there are factors other than the injury that are entering into Mr. Everett's conduct and his condition and this is very material for the jury to find out.

* * * * *

Plaintiff himself denied any intoxication and no such evidence was elicited from him:

(Transcript 51: 17-25, 52: 1-6)

MR. FREEMAN: Q. Have you been drinking to excess during the time, say, from the time you first left the hospital on August 18 until you returned in December?

A. No.

Q. How about the month of November?

A. November? No.

Q. And in particular the 11th, 12th and 13th.

A. I don't remember those dates.

Q. Would you say that your testimony would be any different, that you hadn't been drinking to excess at that time?

A. Would you ask that again, please?

MR. FREEMAN: Will you read the question, please, Mr. Reporter?

(Record read.)

THE WITNESS: I hadn't.

* * * * *

The following day, a witness was offered by defendant, with testimony and motion pictures, to connect up defendant's contention that plaintiff was able-bodied, able to bend, lift, move about freely, and was also spending his time being intoxicated rather than making an effort to work. (*See testimony, Witness Sidney S. Winkler*, Transcript 77-79). The Court permitted the testimony as to bending, lifting and other physical claims, but upon objection

of plaintiff's counsel, refused to permit evidence of intoxication. This refusal to permit offered testimony in connection with defendant's previous statement that this evidence would be connected up, was made after objection by plaintiff's counsel. Defendant at that time was prepared to, and actually had a witness on the stand to testify that such connecting evidence was being offered for the purpose of showing, in line with defendant's position, that plaintiff was actually able to work, but was not making a conscientious effort to do so.

(Transcript 79: 20-25, 80: 1-15)

MR. FREEMAN: Your Honor, we are offering this, as I said before, on the same basis, that his movements, bending, lifting and walking are entirely without any evidence of pain. As I said before, an element entering into this particular case is that rather than doing as he said—I have the transcript here—he said he could not do any lifting at all, that he was in continual pain all the time, that he couldn't bend down without pain, and this man has observed him doing all this, and he has pictures of it and there is no evidence of any pain.

THE COURT: That, of course is relevant, but the question of intoxication is what this objection is to, and I understood you to say yesterday that you would connect it up medically that that has some bearing on the recovery.

MR. FREEMAN: No, I said, and I have the transcript here, I said this was material in my

mind because of the fact we are showing he is making no effort to go back to work, he is engaging in other activities.

THE COURT: What bearing has the intoxication?

MR. FREEMAN: I don't want to argue the whole facts before the jury, Your Honor, but I am willing to if you wish—well, I will leave that.

* * * * *

The intoxication evidence was then excluded from the jury by the Court and ordered out of the case.

(Transcript 80: 16-17)

THE COURT: Very well. The part about the intoxication will go out.

* * * * *

Both plaintiff and defendant then abided by the rule of the Court and no further evidence or discussion of this subject was presented to the jury in either the trial, argument, or instructions. Plaintiff's attorney, though now claiming error, did not ask that the jury be admonished to disregard such offer of evidence (Transcript 80). He neither offered nor requested instructions that the jury be so admonished.

It is the position of the appellee that such evidence was in fact permissible and material to its stated theory of the case and was properly presented to

the Court. Any prejudice of its exclusion by the Court must necessarily be to the defendant and not to the plaintiff.

This matter was fully presented to the trial Court on plaintiff's motion for a new trial. The motion was denied (T. R. page 17.)

The disposition of a motion for new trial rests in the discretion of the trial judge, and appellate courts will not predicate error on his action unless abuse of discretion is shown. (*Beck* vs. *Wings Field, Inc.* 122 F. (2) 114, C. C. A. Pa.) This abuse of discretion by the trial judge must be shown to be one of the law and not of fact. A wide range of discretion rests with the trial judge in refusing or granting a new trial. (citing *Beck* vs. *Wings Field, Inc.*, supra; *Fairmont Glass Works* vs. *West Cub Fork Co.*, 287 U. S. 474, 53, S. Ct. 252, 77 L. Ed. 439.)

This case falls within the well established rule that neither the Supreme Court or the Circuit Court of Appeals would review the action of a federal trial court in granting or denying a motion for a new trial upon an error of fact, since such an action is a matter within the discretion of the trial court. (Citing *Fairmount Glass Works* vs. *West Cub Fork Co.*, supra.; *Francis* vs. *S. P. Co.* 162 F. (2) 813, C. C. A. 10, afmd. 333 U. S. 445, 92 L. Ed. 610, 68 S. Ct. 611, 1948.

In both jury and court trials, the present judicial tendency is to leave the rulings as to the illuminating

relevance of offered testimony largely to the discretion of the trial Court that hears the evidence. (*Morgan, Forward, American Law Institute Code of Evidence,* P. 15) Courts of Appeal are less and less inclined to base error upon such rulings of the trial Court. (*N. L. R. B.* vs. *Donnelly Garment* 67, S. Ct. 756, *U. S.* vs. *Socony Vacuum Oil Co.* 310 U. S. 150, 16 S. Ct. 811, 84 L. Ed. 1129.)

The evidence objected to, viewed in its strongest light, could fall only within the provisions of Ruel 61 of U. S. C. A., Sec. 723 c.

> "Rule 61. *Harmless Error.*
>
> "No error in either the admission or exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the Court or by any of the parties, is ground for granting a new trial or for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

It is obvious from the ruling of the trial Court in denying the motion for a new trial that the trial Judge in his sound discretion, and after having heard all the evidence of the case, decided that plaintiff's rights had not been prejudiced.

Discussion of Evidence Bearing on Specification on Error No. 2.

The evidence of this case presented a substantial disputed question of fact and was properly left to the jury's decision. (*Tiller* vs. *Atlantic Coast Line*, 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967.)

There were no witnesses to the alleged accident other than plaintiff.

(Transcript 46: 8-9)

Q. No one saw you fall?

A. Not that I know of.

* * * * *

Plaintiff told conflicting stories as to how he fell, once claiming he landed directly on his coccyx, once landing on his feet.

(Transcript 34: 24-25, 35: 1-4)

I see in your report that the plaintiff told you he fell a distance of eight or nine feet landing first on his coccyx.

A. Yes.

Q. In other words, that was what struck the ground first.

A. Yes.

* * * * *

(Transcript 72: 22-24)

> . . . he lost his balance and fell to the ground, a distance of about eight feet, landing on his feet, and bent backward.

* * * * *

The story of the fall on his coccyx was so contrary to the facts that the jury could have entirely disregarded it. Plaintiff claimed he fell eight feet to the hard surface of a railroad yard, taking the blow of the fall on his coccyx (supra). His coccyx was a small bone only five-eights of an inch long.

(Dr. Carlson) (Transcript 39: 20-21)

> A. This seemed to be about 5/8 of an inch long at the angle at which we see it.

* * * * *

This alleged fall produced nothing medically discernible in the way of an injury.

(Transcript 102: 8-16)

> Q. I have just been reading the hospital record, Mr. Everett, when you first were taken into the hospital, as to the description, and obviously you didn't write this, I am sure. I see nothing in here about any bruises, cuts, or bumps of any kind. What, if anything, did you have physically to show there?
>
> A. There was no cuts or bruises.
>
> Q. Nothing that showed on the surface?

A. Not that I know of. Nobody said there was. I couldn't see there.

* * * * *

(Transcript 88: 2-6)

Q. Did you find yourself or did the records show anything in the line of a fracture or destroying of nerve tissue or anything other than subjective complaints, his own complaints about the matter?

A. No, sir.

* * * * *

(Transcript 88: 20-23)

A. "X-rays taken on July 14, 1947 of the lumbar and sacral regions, left foot and ankle, latter oblique and stereoscopic shows no evidence of recent fracture or dislocation. Intervertebral spacing is good."

* * * * *

The jury could from the conflicting nature and an inherent improbability of plaintiff's testimony, have disbelieved his claim that the defect was the proximate cause of any injury. This is the jury's province, even though the conflict in the evidence is a narrow one. As the Supreme Court of the United States has stated this year in another railroad accident:

> "While this left only a very narrow conflict in the evidence, it was for the jury not the Court to resolve the conflict."

(*Wilkerson* vs. *McCarthy*, 69 S. Ct. 413.)

There were other obvious conflicts in the evidence which the jury could have and apparently did resolve against the plaintiff.

His alleged coccyx defect was apparently congenital and not the result of trauma. Both plaintiff and defendant's medical experts so testified:

(Dr Carlson) (Transcript 43: 7-15)

Q. Now, this sacral defect you say is congential?

A. Yes.

Q. And also the coccyx defect?

A. Yes.

Q. By congenital you mean he was born that way?

A. Yes.

Q. And it has nothing to do with the accident?

A. So far as whether it tilted it more in the accident I couldn't prove.

* * * * *

(Dr. Holcomb) (Transcript 59: 10-22)

Q. Did you discover anything unusual about the bony structure of his coccyx?

A. Well, he has a deviation in his coccyx to—which side it was, I forget whether right or left. You can see a little curve in it in the X-ray picture, but of all the bones of the body that are irregular I think the coccyx is the

most irregular. It can have any place from one segment to four segments in it, and it may have joints that are irregular in character and irregular in curvature. So it is irregular and deviated to one side, but as far as I could see it is not due to trauma, it is a development phenomenon.

Q. By "not due to trauma" you mean not due to injury.

A. Yes.

* * * * *

He was told by the doctors who treated him that he was physically able to work on two separate occassions, but quit work of his own volition.

(Transcript 47: 24-25, 48: 1-3)

Q. Isn't it a fact that those doctors gave you a return-to-duty slip on August 18 of last year?

A. Yes.

Q. You didn't go back, did you?

A. No.

* * * * *

(Transcript 50: 7-9)

Q. How many return-to-duty slips have you actually been given?

A. Two.

* * * * *

(Transcript 50: 17-18)

Q. It was your idea, then, to stop work?

A. Yes.

* * * * *

He first testified that he could lift nothing, and the following day changed this testimony.

(Transcript 48: 15-16)

Q. What kind of lifting or anything could you do?

A. None.

* * * * *

(Transcript 99: 22-25)

MR. BROBST: Q. Well, did you lift objects, Mr. Everett?

A. Yes

Q. Approximately how heavy?

A. Oh, 12 or 15 pounds.

* * * * *

This alleged inability to work is one denied by medical testimony.

(Transcript 63: 11-23)

MR. FREEMAN: Q. Doctor, Mr. Everett, as you know, is a railroad fireman. Did you in your examination see any reason why Mr. Everett shouldn't return to work?

A. No, from a clinical standpoint, from the way he looks, he looks strong, looks all right. He says he can't return to work because in riding in the soft seats of a train it jars him up from the vibration. He can't, he says, but from a clinical standpoint we can see no reason why that should be true.

Q. Disregarding what he tells you, can you find anything medically that would justify you in saying he should not return to work?

A. No, sir.

* * * * *

(Transcript 67: 6-18)

A. Well, I am not his doctor, of course, Mr. Brobst, and I was merely asked to give an opinion as to what I can find, and say so. My findings are that very often lawsuits, litigations, keep symptoms up long after they are normally gone, and that, I think, must be taken into consideration. I think the average doctor does take that into consideration and does not do things that he cannot justify in his own mind, and I think probably that is why the doctors haven't done it.

Q. What I am trying to find out is what the cause of his pain is and why he can't go bak to work, if you can help me.

A. Well, I would suspect that after this action is over he will go back to work. That will be my guess as to the cause of his illness and pain.

* * * * *

The jury with a substantial disagreement as to whether plaintiff had been injured as the proximate result of a defect or in fact injured at all, resolved the matter against plaintiff and in favor of defendant. The evidence as quoted, shows that there was a question of a character which reasonable men could differ on the facts before them. And where "fairminded men may honestly draw different conclusions from the evidence, the question is not one of law, but of fact to be settled by the jury." *Best* v. *District of Columbia*, 291 U. S. 411, 415, 54 S. Ct. 487, 489, 78 L. Ed. 882. Cf. also *Myers* v. *Reading Co.*, 331 U. S. 477, 484, 485, 67 S. Ct. 1334, 1338, 1339, 91 L. Ed. 1615, which recognized the rights of a jury to determine from the manner and results of the operation of a freightcar brake, whether it was an "efficient" hand brake within the requirement of section 2 of the Act of April 14, 1910, 45 U. S. C. A. Sec. 11, of the Safety Appliance Act.

In this conection, heed necessarily must be given to the unmistakable teaching of the Supreme Court in its recent decisions, that trial and appellate courts, both federal and state, on questions of liability under the Federal Employers' Liability Act, have been taking too narrow a view generally of the scope of permissive inference which is open to a jury on "probative facts." As one of the Justices has expressed it, in indicating the purpose of that Court's repeated overturning of decisions in such cases during the past few years (approximately 20 since 1943), "The

historic role of the jury in performing that function . . . is being restored in this important class of cases." See concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy*, 69 S. Ct. 413, 422.

Appellee realizes that the cases upon which it must rely in sustaining its position are ones in which the plaintiff rather than the defendant secured the verdict from the jury. However, that matter is, in Appellee's opinion, immaterial as it is obvious that a jury's verdict in favor of a defendant would receive the same consideration from the Circuit Court of Appeals and Supreme Court as would one for the plaintiff.

The opinions of the Supreme Court have declared that it is "the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury," *Tiller* v. *Atlantic Coast Line R. Co.* 318 U. S. 54, 68, 63 S. Ct. 444, 451, footnote 30, 87 L. Ed. 610, 143 A. L. R. 967, *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; that the jury has the right to make "all reasonably possible inferences" from such probative facts in the evidence as it chooses to accept, and "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences," (*Tennant* v. *Peoria & P. U. Ry Co.*, 321 U. S. 29, 32-35, 64 S.

Ct.) 409, 411, 412, 88 L. Ed. 520; that in any choice between possible inference "a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference". (*Lavender* v. *Kurn*, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916.

Departing for a moment from the decisions of federal courts, the case at hand is remarkably similar to that of *Lewy* vs. *A. T. S. F. Railway*, 86, C. A. (2) 118, 1948. In this particular case, a railway fireman alleged an injury arising out of an accident. The evidence is beyond dispute that there was actually an accident of some sort, but the evidence was conflicting as to whether or not plaintiff was actually injured in this accident. The jury rendered a verdict against plaintiff and in favor of defendant. The Appellate Court in reviewing the case states:

> "From an examination of the entire evidence, the jury might well have believed that plaintiff exaggerated the extent of and suffered no substantial or permanent injury due to any claimed neglect of the defendants. In support of the verdict and judgment we must accept this implied finding. Where there is a conflict in evidence and the evidence relied upon is of a substantial character, the judgment will not be disturbed on appeal. (*Herbert* vs. *Lankershim*, 9 Cal. (2) 409.)

On these decisions, and upon the facts of the case, plaintiff and appellee respectfully believes that the trial Court clearly was entitled to allow the jury to decide whether the defect was the proximate cause of any injury and to decide whether or not the plaintiff was in fact injured at all. The verdict of the jury has answered this question.

* * * * *

CONCLUSION

It is respectfully submitted that the trial Court committed no prejudicial error and the judgment should be affirmed.

Dated, Oakland, California, May 23, 1949.

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